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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

NICOLAS BENJAMIN MOORE,

Defendant and Appellant.

E063358

(Super.Ct.No. INF1400898)

OPINION

APPEAL from the Superior Court of Riverside County. Victoria E. Cameron,
Judge. Affirmed with directions.

Paul Stubb, Jr., under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Barry Carlton, and Sabrina Y.
Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

In this Proposition 47¹ case, defendant and appellant, Nicolas Benjamin Moore, appealed an order denying his petition to reduce his felony conviction for receiving stolen property (Pen. Code, § 496, subd. (a))² to a misdemeanor under Proposition 47. In our previous unpublished decision, we affirmed the trial court ruling denying defendant's petition on the ground the value of the stolen property exceeded \$950, thereby disqualifying him from resentencing under Proposition 47 ruling.

The California Supreme Court granted review and has transferred this matter back to us with directions to vacate our decision and reconsider the cause in light of *People v. Franco* (2018) 6 Cal.5th 433 (*Franco*), *People v. Page* (2017) 3 Cal.5th 1175 (*Page*), and *People v. Romanowski* (2017) 2 Cal.5th 903 (*Romanowski*). Having vacated our prior opinion and, after reconsideration as instructed, we affirm the trial court judgment, without prejudice to defendant providing evidence of eligibility for resentencing under Proposition 47, consistent with *Franco* and *Romanowski*.

¹ The Safe Neighborhoods and Schools Act, Penal Code, § 1170.18.

² Unless otherwise noted, all statutory references are to the Penal Code.

II.

FACTS AND PROCEDURAL BACKGROUND

In September 2014, defendant pled guilty to a single count of felony receiving stolen property and admitted one prior strike conviction³ in exchange for imposition of a four-year sentence (the middle term, doubled for the strike prior) and dismissal of defendant's remaining prior convictions and prison priors. The trial court imposed the four-year sentence in October 2014.

In November 2014, the electorate passed Proposition 47. Defendant filed a petition for resentencing under Proposition 47. The People opposed the petition, asserting that the value of the stolen property at issue, consisting of a wallet, checkbook, and credit card, exceeded \$950. The trial court set the matter for a hearing on the value of the stolen property.

Defendant, represented by counsel, filed points and authorities in support of his petition for resentencing. Defendant argued that the record of conviction established that the stolen credit cards were of no value to anyone except the account holder and the record was devoid of any evidence which would disqualify defendant from resentencing. Defendant disagreed that the credit card limit was the value of the credit card, because the available credit could have been far less. Also, once a stolen credit card is reported stolen, the account is frozen and the card cannot be used by anyone. Defendant noted that, even before this happens, banks are quick to detect unauthorized use and freeze the

³ Sections 496, subdivision (a), 667, subdivisions (b)-(i).

account. Defendant argued the courts look to the fair market value of the item, not the value to the owner.

The People filed opposition, arguing that the card had value beyond the plastic from which it was made. Credit cards are stolen for the purpose of using them up to the credit limit, which should therefore serve as the measure of the value of the card. The People added this same manner of determining value applies to the stolen checks. The balance in the checking account would determine the value of the stolen checks.

In response, defendant filed supplemental points and authorities, attaching an article discussing the value of stolen credit cards. The article states that the value is not how much credit is available on the credit card, but the extent to which the credit card is being used fraudulently. The brief article concludes the value of a credit card on the black market is only \$3.50.⁴

During the hearing on defendant's resentencing petition, the trial court noted defendant had the burden of proof. The court stated that, had the crime been prosecuted at the time of the resentencing hearing, it would have been a felony. The court concluded defendant did not meet his burden of proof in establishing that the value of the stolen property did not exceed \$950.

⁴ The reliability of the article is questionable. The publisher of the 2011 article is not identified. The author is "bryanh." The article is dated December 27, 2011.

The court stated it agreed with the People that a credit card is worth more than the plastic it is made of. Otherwise no one would bother stealing a credit card. Credit cards “are stolen for the credit limit as are the checks.” The court found, based on the listed credit limits of each of the stolen items, that “the credit card and the checks, the book of checks, they each in and of themselves carry a value in excess of \$950.” The court also noted that, in order for defendant to have pled guilty to the felony of receiving stolen property, the value of the stolen property would have exceeded \$950. The court believed the attorney representing defendant when he pled guilty would not have permitted defendant to plead guilty to felony receipt of stolen property if defense counsel thought the value of the stolen property was less than \$950.

Defendant’s attorney, Alex Hallowell, stated that he was not certain of either the credit limit on the stolen credit card or the remaining available credit on the card. Hallowell stated that what mattered was that defendant did not use the credit card and was not charged with doing so. He was only charged with possessing the credit card. Hallowell added there is case law that holds that the value of a stolen item is the fair market value; that is, what the item can be sold for on the open market. Hallowell believed a credit card could not be sold on the open market for the value of the card’s credit limit. He believed that the amount someone would pay for a credit card would be somewhat less than that. The prosecutor at the resentencing hearing, Kristi Hester, argued the stolen property exceeded \$950 in value, as asserted in the People’s opposition.

The court noted that the issue was whether the credit card limit was the value of the card. Hallowell responded he did not know what the value of the credit card was, what the credit card limit was, or how much credit was available on the credit card. Hallowell added that defendant was not convicted of using the credit card or checks. He was only convicted of possession.

The trial court denied defendant's resentencing petition, finding that the value of the credit card, wallet, and checks exceeded \$950. The court explained that defendant did not possess the credit card just for the plastic. He possessed it because it had value because of the credit card limit.

A. Appeal, Supreme Court Review, and Transfer Back to This Court

After this court affirmed the trial court ruling denying defendant's Proposition 47 resentencing petition, defendant filed a petition for Supreme Court review, arguing that the trial court applied an unreasonable and improper valuation method in determining the value of the stolen credit card found in defendant's possession. The Supreme Court granted defendant's petition for review and ordered that further action in the matter was "deferred pending consideration and disposition of related issues in *People v. Franco*, S233973, and *Caretto v. Superior Court*, S235419 . . . , or pending further order of the court."

After deciding *Franco, supra*, 6 Cal.5th 433, and other related cases, the Supreme Court transferred this case back to this court "with directions to vacate its decision and to reconsider the cause in light of *People v. Franco* (2018) 6 Cal.5th 433, *People v. Page* (2017) 3 Cal.5th 1175, and *People v. Romanowski* (2017) 2 Cal.5th 903." In accordance

with that order, this court vacated its opinion filed on June 15, 2016. This court invited the parties to file supplemental briefs in response to the Supreme Court's order. Neither party has done so. We therefore deemed the matter submitted and reconsider the matter in accordance with the Supreme Court's order.

III.

DISCUSSION

Defendant contends the record does not show that the value of the stolen property associated with his conviction for receipt of stolen property exceeded \$950. The stolen property consists of a wallet and checkbook, and their contents, including a credit card and checks. Defendant further contends there was no loss because defendant did not use the stolen credit card or checks. The People argue the stolen property had monetary value and defendant did not meet his burden of establishing the value did not exceed \$950.

A. Applicable law

Proposition 47 added section 1170.18, which allows “[a] person currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor under [Proposition 47 had it] been in effect at the time of the offense,” to “petition for a recall of sentence” and request resentencing.

(§ 1170.18, subd. (a).) A person seeking resentencing under section 1170.18 must show he or she fits the criteria in subdivision (a). If the person satisfies the criteria, the person shall have his or her sentence recalled and resentenced to a misdemeanor, unless the court, in its discretion, determines that resentencing the petitioner would pose an

unreasonable risk of danger to public safety. (§ 1170.18, subd. (b); *T. W. v. Superior Court* (2015) 236 Cal.App.4th 646, 649, fn. 2.)

Section 1170.18, subdivision (b) provides in part: “‘Upon receiving a petition under subdivision (a), the court shall determine whether the petitioner satisfies the criteria in subdivision (a).’ Under subdivision (b) a person who satisfies the criteria in subdivision (a) of section 1170.18 shall have his or her sentence recalled and be sentenced to a misdemeanor (subject to certain exclusions not relevant here).” (*People v. Sherow* (2015) 239 Cal.App.4th 875, 879.) The statutory criteria a defendant must establish for resentencing “are that the ‘person [is] currently serving a sentence for a conviction, whether by trial or plea, of a felony or felonies who would have been guilty of a misdemeanor . . . had this act been in effect at the time of the offense’ (§ 1170.18, subd. (a).)” (*People v. Hoffman* (2015) 241 Cal.App.4th 1304, 1309.)

Defendant has the burden of proof of establishing that the stolen property’s value does not exceed \$950. (*People v. Sherow, supra*, 239 Cal.App.4th at pp. 878, 880.) We review the trial court’s legal conclusions de novo and its findings of fact for substantial evidence. (*People v. Perkins* (2016) 244 Cal.App.4th 129, 136.) “The trial court’s decision on a section 1170.18 petition is inherently factual, requiring the trial court to determine whether the defendant meets the statutory criteria for relief,” including whether the value of the property involved is less than \$950. (*People v. Contreras* (2015) 237 Cal.App.4th 868, 892.)

B. Analysis

In accordance with the Supreme Court's order transferring this matter back to this court, we vacated our previous decision affirming the trial court's ruling denying defendant's Proposition 47 petition and, as instructed, have reconsidered the matter in light of *Franco*, *supra*, 6 Cal.5th at 433, *Page*, *supra*, 3 Cal.5th 1175, and *Romanowski*, *supra*, 2 Cal.5th 903. In doing so, we conclude the trial court did not err in denying defendant's Proposition 47 petition, but the ruling should be affirmed without prejudice to defendant filing a new petition in the trial court supported by evidence establishing the value of the stolen property consistent with *Franco* and *Romanowski*.

In *Franco*, the defendant pled guilty to possessing a forged \$1,500 check in violation of section 475, subdivision (a) (forgery). (*Franco*, *supra*, 6 Cal.5th at p. 434.) After enactment of Proposition 47, the defendant requested his forgery felony conviction reduced to a misdemeanor. The trial court rejected his contention the forged check's value was less than \$950 and denied the defendant's Proposition 47 petition. The Supreme Court in *Franco* held that the value of the forged check was the amount written on the check and therefore the trial court properly denied the defendant's Proposition 47 petition. (*Franco*, *supra*, at pp. 434, 441.)

In reaching its holding, the *Franco* court explained there are three methods of evaluating the value of property that is the subject of a Proposition 47 petition. Those three methods include: (1) the intrinsic value of the property, such as the value of the property's material (paper, plastic, etc.); (2) the value written on the forged document; and (3) the actual monetary worth of the property, such as the fair market value, that is,

the amount the defendant could obtain for the property, which is not necessarily the amount written on the check or document. (*Franco, supra*, 6 Cal.5th at p. 437.) The *Franco* court concluded that the method used when evaluating the value of property that is the subject of a forgery differs from the method used to determine the value of property that is the subject of a theft. (*Id.* at p. 438.)

In the Proposition 47 case, *Romanowski, supra*, 2 Cal.5th 903, the defendant was convicted for theft of access card information under section 484e (theft of access cards or account information). The defendant filed a Proposition 47 petition for recall of his sentence. The California Supreme Court in *Romanowski* noted that “theft of access card account information—an offense that includes theft of credit and debit card information,” is one of the theft crimes eligible for reduced punishment. (*Romanowski, supra*, at pp. 905-906.) The court explained that “Proposition 47 broadly reduced punishment for ‘obtaining any property by theft’ where the value of the stolen information is less than \$950. (Pen. Code, § 490.2, subd. (a).) And while Proposition 47 does not specify a particular valuation test for this \$950 threshold, the Penal Code section that defines theft says that ‘the reasonable and fair market value shall be the test’ for determining the value of stolen property.” (*Romanowski, supra*, at p. 906; see also § 484, subd. (a).)

The *Romanowski* court concluded that under section 484, subdivision (a) (theft) and Proposition 47, the “‘reasonable and fair market value’” test applies to petty theft convictions (§490.2). (*Romanowski, supra*, 2 Cal.5th at p. 906.) The *Romanowski* court held that this language “requires courts to identify how much stolen access card information would sell for. (§ 484, subd. (a); see also *People v. Tijerina* [(1969) 1 Cal.3d

41,] 45 [‘in the absence of proof . . . that the price charged by a retail store from which merchandise is stolen does not accurately reflect the value of the merchandise in the retail market, that price is sufficient to establish the value of the merchandise’]; *People v. Pena* (1977) 68 Cal.App.3d 100, 104 [‘When you have a willing buyer and a willing seller, neither of whom is forced to act, the price they agree upon is the highest price obtainable for the article in the open market. Put another way, “fair market value” means the highest price obtainable in the market place’]” (*Romanowski, supra*, at p. 915.)

The *Romanowski* court further noted that “courts may consider evidence related to the possibility of illicit sales when determining the market value of stolen access card information.” (*Romanowski, supra*, 2 Cal.5th at p. 906; see also *Caretto v. Superior Court* (2018) 28 Cal.App.5th 909, 916-920 (*Caretto*).) “When a defendant steals property that is not sold legally, evidence related to the possibility of illegal sales can help establish ‘reasonable and fair market value.’ Only in cases where stolen property would command no value on any market (legal or illegal) can courts presume that the value of stolen access information is de minimis.” (*Romanowski, supra*, at p. 915.)

Although defendant’s offense was receiving stolen property (§496, subd. (a)), not theft of access card information (§ 484e, subd. (c)), the valuation issue is the same and the reasoning in *Franco* and *Romanowski* apply with equal force. (*Caretto, supra*, 28 Cal.App.5th at p. 918.) Under *Franco* and *Romanowski*, defendant had the burden of establishing the “‘reasonable and fair market value’” of the stolen property in defendant’s possession, which included a stolen credit card, checkbook, and wallet. (*Romanowski*,

supra, 2 Cal.5th at p. 906; *Franco, supra*, 6 Cal.5th at pp. 438-439; *People v. Sherow* (2015) 239 Cal.App.4th 875, 878.) Defendant failed to meet this burden of proof.

By pleading guilty in 2014 to receiving stolen property (§ 496, subd. (a)), defendant admitted the elements of the crime. Defendant's attorney also joined in the plea, and the trial court approved it, finding there was a factual basis for the plea. At the time of defendant's plea, section 496, subdivision (a), stated, in relevant part, that "Every person who buys or receives any property that has been stolen . . . shall be punished by imprisonment in a county jail for not more than one year, or imprisonment pursuant to subdivision (h) of Section 1170. However, if the district attorney . . . determines that this action would be in the interests of justice, the *district attorney . . . may, if the value of the property does not exceed nine hundred fifty dollars (\$950), specify* in the accusatory pleading that *the offense shall be a misdemeanor*, punishable only by imprisonment in a county jail not exceeding one year." (Former § 496, subd. (a); italics added.)

The complaint in the instant case charged the offense of receipt of stolen property as a felony, not a misdemeanor, and defendant pled guilty to committing the crime of felony receipt of stolen property. Since the crime was not alleged as a misdemeanor and defendant agreed to plead guilty to the crime as a felony, it can be reasonably inferred that the parties agreed the value of the stolen property exceeded \$950. In addition, during the hearing on defendant's Proposition 47 petition, the trial court noted that no one disputed that the credit card limit was over \$950. Evidence of a credit card's limit could be relevant to fixing the highest price in the marketplace for stolen credit cards. The value of stolen credit cards may turn on the amount of credit accessible with the card,

with the higher the available credit, the more valuable the credit card. (See *Caretto*, *supra*, 28 Cal.App.5th at p. 919.) Defendant's attorney acknowledged during the hearing on defendant's Proposition 47 petition that he did not know what the value of the credit card was, what the credit card limit was, or how much credit was available on the credit card.

Because defendant did not present sufficient admissible evidence establishing that the value of the stolen wallet, checkbook, and credit card was \$950 or less, defendant failed to meet his burden of proof required for Proposition 47 sentencing relief. Although we therefore again affirm the trial court's order denying defendant's Proposition 47 petition, we do so in accordance with *Page*, *supra*, 3 Cal.5th 1175, by affirming the order without prejudice to defendant presenting evidence establishing the value of the subject property, consistent with *Franco*, *supra*, 6 Cal.5th 433 and *Romanowski*, *supra*, 2 Cal.5th 903.

In *Page*, *supra*, 3 Cal.5th 1175, the Supreme Court held that the trial court erred in ruling that a conviction for taking or driving a vehicle without the owner's consent (Veh. Code, § 10851) is categorically ineligible for resentencing under Proposition 47. The court in *Page* therefore concluded that the defendant was eligible for resentencing if the vehicle at issue was worth \$950 or less and he was sentenced for theft of the vehicle, as opposed to driving the vehicle without consent. (*Page*, *supra*, at p. 1180.) Because the *Page* defendant had not provided sufficient evidence of these factors, the *Page* court affirmed denial of the Proposition 47 petition but modified the judgment to provide that the trial court's order denying the petition was affirmed without prejudice to

consideration of a new petition providing evidence of the defendant's eligibility. (*Page, supra*, at p. 1190.) The court in *Page* explained that, on remand, the defendant was entitled to the opportunity to allege and prove his eligibility for resentencing. (*Id.* at p. 1189.)

Likewise, here, the trial court's order denying defendant's Proposition 47 petition is affirmed without prejudice to defendant proving eligibility for sentencing relief under Proposition 47. Because *Franco, supra*, 6 Cal.5th 433, *Romanowski, supra*, 2 Cal.5th 903, and *Page, supra*, 3 Cal.5th 1175, provided critical guidance on how to value the stolen credit card at issue here, and the cases were decided after the trial court proceedings in the instant case, defendant should be given an opportunity to present evidence of the value of the stolen property, consistent with *Franco* and *Romanowski*. We will therefore remand this matter to allow defendant to present evidence of the value of the stolen property in support of his Proposition 47 petition. (*Page, supra*, at p. 1189; *Caretto, supra*, 28 Cal.App.5th at p. 921.)

IV.

DISPOSITION

We affirm the trial court order denying defendant's Proposition 47 petition, without prejudice to defendant providing evidence of his eligibility for Proposition 47 sentencing relief consistent with *Franco, supra*, 6 Cal.5th 433 and *Romanowski, supra*, 2 Cal.5th 903. This matter is ordered remanded for further proceedings consistent with this opinion.

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CODRINGTON
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.